IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1074 OF 2003

Finlay Mills ..Petitioners

Vs.

Mrs.Supriya S.Ghugare ..Respondent

Mrs.Meena Doshi for the petitioners

Mr.S.N.Deshpande for the respondent

CORAM : S.U.KAMDAR, J
DATED : 26TH APRIL, 2006

ORAL JUDGMENT:

1. The present petition is filed challenging the order dt.4.12.2002 passed in Complaint (ULP) No.169 of 1996. By the said order, the Industrial Court, Bombay has declared that the petitioners have engaged in unfair labour practices under Item 5, 9 and 10 r/w Item 1 of Schedule IV of the MRTU & PULP Act, 1971. By the said order, the petitioners are further directed to allow the complainant to report and resume on her duty in her original post with full back wages and other monetary benefits and continuity of service with effect from the date

on which the respondent Mill is taken over by the N.T.C. The petitioners are also directed to allow the complainant to resume on duty in her original post within one month from the date of the said order and further directed that the said back wages be paid with interest @ 6% p.a. Some of the material facts of the present case are briefly enumerated as under:

2. Finlay Mills was declared a sick undertaking and was taken over by N.T.C. on 18.1.82. On account of general strike in the mills, the work of the petitioner mill was paralysed and an application was made to declare the said strike illegal. The said strike was accordingly declared illegal by the Labour Court. Subsequently, petitioner mill restarted functioning after the strike was over. It is the case of the petitioner that the respondent did not approach the petitioner for resuming her duties nor showed any interest to contact a representative union of the Cotton Textile Industry in the city of Mumbai. It is the case of the petitioner that the respondent had abandoned her services.The respondent was

working in R & T department as a Semi Clerk and was confirmed in the said post. Thereafter she was promoted as an Investigator in the said department and she continued to work in the said company. She proceeded on maternity leave for the period June 1982 to August 1982. It is the case of the petitioner that however, on completion of maternity leave she did not resume her duty with the petitioner mill. Sometime in or about 1988-89, the petitioner entered into correspondence with the General Manager of Apollo Mills and the Bio-data was sent to the Apollo Mills on 30.3.91. It is the case of the petitioner that however, thereafter respondent did not make any efforts to resume the job whereas the case of the respondent is that respondent went on approaching the Mill from time to time right from 1982-83 till 1990 and even after 1990 respondent has approached various authorities including concerned Ministry and Government to seek the employment back. On 22.12.95 an approach notice was issued by the respondent under the provisions of BIR Act and subsequently a complaint was moved before the Industrial Court under item 5, 9 and 10 r/w Item 1 of Schedule IV of the MRTU &

PULP Act, 1971.

3. It is the case of the respondent that inspite of efforts to resume the work, respondent was not allowed to resume her duties and therefore it is contended by the respondent that there is a breach of the settlement between the parties and thus, the petitioners have committed an unfair labour practice by virtue of item 9 of Schedule IV of the MRTU and Pulp Act, 1971. On 15.7.99 the complaint was dismissed on the ground that the court had no jurisdiction. The said order was challenged by preferring a writ petition being writ petition no.2223 of 1999. The said writ petition was disposed of by an order dt.5.6.02 remanding the matter back to the industrial court for adjudication on merits. On remand the matter was heard and by the impugned order dt.14.12.2002 the Industrial Court has allowed the complaint of the petitioners and directed the reinstatement of the respondent workman in the said job with aforesaid direction of back wages with interest @ 6% p.a. and continuity of service.

4. The petitioner employer has filed the present petition challenging the said order of the Industrial Court dt.14.12.02. By an order dt.19.4.03 the petition was admitted only in regard to back wages and in respect of question of reinstatement the court did not grant rule and further directed the petitioner to reinstate the respondent workman immediately. In so far as back wages is concerned, the stay was granted on the condition that respondent to deposit the said amount within 8 weeks from the said date with liberty to respondent workman to withdraw 50% of back wages from 1996 onwards after giving some security to the satisfaction of the Prothonotary and Senior Master and the balance amount has to be invested in Fixed Deposit of a Nationalised Bank. The learned counsel for the respondent submits that no such amount has been withdrawn and therefore, the amount is lying with the Prothonotary and Senior Master in Fixed Deposit with accrued interest. In view of the order passed at the stage of admission giving rule restricted only to claim of backwages, I am required to determine only the aforesaid issue and not an issue of reinstatement.

5. The learned counsel for the petitioner has submitted that in so far as issue of back wages is concerned, the trial court was wrong in granting the said amount. The learned counsel has submitted that the back wages should not have been directed firstly on the ground that there was in fact an abandonment of services and there was no termination and if so in that event the respondent was not entitled to any back wages because it is the respondent herself who did not resume the job and therefore she was not entitled to benefit of wages. On the other hand, the learned counsel for the respondent has submitted that in fact there was no termination of services of the respondent and the respondent was in continuous job with the contract of employment subsisting and surviving and therefore as a matter of natural corollary, the respondent was entitled to payment of wages in terms of contract of employment between the parties.

6. In so far as aforesaid contention is concerned, I am of the view that the issue whether she has

abandoned the services or that she has been wrongfully terminated has been at length considered by the Trial Court and has come to the conclusion that there is no abandonment of services. It has been further held by the trial court that in fact there is refusal on the part of the Manager to provide work and consequently there is a wrongful termination of services of the respondent herein. The said finding has been confirmed by the learned single Judge of this court while passing the order dt.19.4.03 and directing reinstatement of the employee. In my opinion, once there is a wrongful termination of services the submission made by both the counsel as recorded hereinabove has to be rejected. In my opinion, once there is a refusal to provide work there is consequently a termination of employment of respondent herein and if respondent has been reinstated then the respondent is entitled to back wages subject to principles which are laid down by the apex court in the various judgments.

7. Now turning to the next part that whether on the facts of the present case respondent was

entitled to back wages or not. My attention has been drawn by the learned counsel for the petitioner that the complaint which has been filed did not have any averment in respect of claim of back wages. The only averment which can be even screened out after reading the entire complaint is the following few lines. The same is reproduced hereunder:

> "Complainant is suffering monetarily as well as financially because of the unfair labour practices. Hence balance of convenience is over-whelmingly in her favour. Irreparable harm and injury could be caused to her if the reliefs as prayed would not be granted. The Hon'ble Court is therefore prayed to grant the reliefs as prayed."

8. It was further submitted that no evidence is laid by the respondent even to prove the said inadequate averments. The evidence of the respondent employee in respect of payment of back wages is only of one sentence which is found in examination in chief of the respondent employee which reads as under:

> "After 1983, till this date I could not get employment anywhere. I made efforts for getting services in many mills."

9. The learned counsel for the petitioners has therefore submitted that the respondent has not discharged the burden of proof to prove that the respondent was entitled to payment of back wages by virtue of the fact that she was not gainfully employed and that she made all efforts to find an alternate job and has failed. The learned counsel for the petitioner has therefore submitted that the law as it stands now it lays the burden of proof on the employee to establish firstly that the employee was not in employment during the period when her services were terminated and secondly, the employee made all necessary efforts to find an opportunity to have an alternate job during the said period and that in the said efforts the employee has failed. It has been submitted that on the facts of the present case there is no material whatsoever by the respondent employee that the respondent made any efforts to get any alternate job. It has been thus, submitted that the respondent was not entitled to any payment of back wages.

10. On the other hand, the respondent has submitted that in so far as back wages are concerned, it is a settled law that back wages is necessary corollary to the order of the reinstatement. It has been submitted that once the order of reinstatement is granted, the employee is entitled to back wages without any further proof being laid in that behalf and it is for the employer to establish that the respondent was gainfully employed and was drawing salary and therefore, the employee is not entitled to full back wages.

11. Both the learned counsels on the aforesaid issue has taken me through large number of judgments. The learned counsel for the respondent has drawn my attention to the judgment of the Supreme Court in the case of Sarva Shramik Sangh, Bombay v. Indian Hume Pipe Co.Ltd. and Anr reported in 1993 II CLR 355 particularly para 4 and 7 thereof and has contended that in a case where the employment is subsisting then the person is automatically entitled to payment of wages even if the termination is held to be illegal and void. It

has been submitted that in the light of the aforesaid position of law, there is no need to lead any evidence before the Industrial Court for the purpose of establishing the claim of back wages. He has thereafter relied upon the Judgment of the Apex Court in the case of Mohan Lal v. The Management of M/s.Bharat Electronics Ltd. reported in AIR 1981 Supreme Court 1253. He has particularly relied upon para 17 of the said judgment. The relevant portion therefore reads as under:

> "The last submission was that looking to the record of the appellant this Court should not grant reinstatement but award compensation. If the termination of service is ab initio and inoperative, there is no question of granting reinstatement because there is no cessation of service and a mere declaration follows that he continues to be in service with all consequential benefits."

12. The learned counsel for the respondent has thereafter relied upon the judgment of the apex court in the case of S.M.Saiyad v. Baroda Municipal Corporation reported in 1985(50)F.L.R. page 81. The relevant portion reads as under:

"The High Court declined to grant back wages for the period the appellant was seeking relief of reinstatement in Civil Court. It may be recalled that the appellant has been reinstated in service meaning thereby that the dismissal of the appellant from the service of the respondent was found to be invalid and a declaration followed that the appellant continuing to be in service. It is in the context of these facts that we have to examine the submission that the High Court was not justified in refusing the back wages on the only ground that the appellant sought relief from a forum which had no jurisdiction to grant the same. When the appellant was dismissed from service he was not a qualified lawyer. He must have sought assistance and advice from a qualified legal practitioner and then approached the Civil Court for relief of reinstatement. The appellant must have gone in search of justice to a forum to which he must have been advised to approach but ultimately because of complexities of the Justice system it transpired that he cannot get relief from that forum. He cannot be faulted for this outcome of technicalities of jurisdiction. Now if on this account the appellant is declined back wages he suffers double jeopardy through no fault of his, in that not only all wages are directed but also delay occurred in getting reinstatement. Is this denial justified when the appellant could not be blamed for approaching a forum under competent legal advice. This would amount to imposing a penalty which with respect to the High Court the appellant did not deserve. On this lean ground we find it difficult to depart from the normal rule that on dismissal order being found to be invalid and the direction for reinstatement having been given the workman would be entitled to full back wages, unless the

> same can be denied on some relevant grounds. We are of the opinion that the denial of back wages for a portion of period for the reason that he was prosecuting remedy in a wrong forum would not be a relevant consideration for refusal of back wages. As a corollary to this finding the appellant would be entitled to back wages for the whole of the period December 12, 1969 to October 26, 1976 and straightway we would have awarded the same but further enquiry becomes necessary on account of one more aspect brought to our notice."

13. The learned counsel for the respondent has thereafter relied upon another judgment in the case of Central Co-operative Consumers' Store Ltd through its General Manager v. Labour Court, H.P. at Shimla and Anr. reported in 1993 II CLR 9 in which while scrutinising the appointment of public sector enterprises the court has come to the conclusion that the party in that case was harassed and was not given reinstatement inspite of various orders of the court and ordered the back wages also. The learned counsel for the respondent has thereafter relied upon the judgement in the case of Pandurang Nanasaheb Jagadale v. Chairman and Ors reported in 1991 II CLR 532. He has also relied upon the judgment in the case of Union of India, through the Superintendent of Post Offices, Wardha

Division v. M.Z.Quazi reported in 1990 II CLR 735 and judgment of the Division Bench of this court in the case of Kuppanda Kalappa Muddappa v. The Hindustan Aeronautics Ltd.and Ors reported in 1992 II CLR 153. He has also relied upon the judgment of single Judge of this court in the case of Nasim Madhyawarti Sahakari Grahak Sangh Ltd Nasik and Ors v. Shri Babulal Tulshiram Jobanputra and Ors reported in 1991 II CLR 578. The learned counsel has thereafter relied upon another judgment in the case of The Premier Automobiles Employees' Union and Ors v. The Premier Automobiles Ltd. and Ors. reported in 1987 2 CLR 302 particularly para 18 thereof which reads as under:

> "18. The Industrial Court recorded the argument on behalf of the advocates for the complainants that there was always an implied agreement between the employer and the employee that the employee was bound to supply work and the employer was entitled to receive wages. The argument was not considered and there is no finding thereon. I should have thought that it is the most basic, though it may be implicit, term of an agreement between an employer and his employee that the employee shall make himself available to the employer to do his work and that the employer shall pay the employee wages for doing so. Failure to pay wages, when an employee has made himself available to do the employer's

> work, is a breach of the agreement between them. That the employer has no work for the employee to do does not cause a suspension of his obligation to pay wages to the employee. When even in such circumstances, the employees does not pay wages to his employee and, particularly, where the failure is regarding his employees en masse- the employer is guilty of the unfair labour practice of not implementing his agreement with the employee."

14. On the other hand, the learned counsel for the petitioners has submitted that the principle on which the back wages has to be determined has undergone a sea change and the earlier view which prevailed by the earlier judgment of the apex court has been substantially given a go by.

15. The learned counsel for the petitioner has drawn my attention to the latest judgment of the Apex Court in the case of U.P.State Brassware Corpn.Ltd. and Anr. v. Uday Narain Pandey reported in 2006 I SCC 479 in which all earlier views have been considered. In the said judgment the apex court has come to the conclusion that the grant of back wages is not a natural corollary of reinstatement. An order of back wages is based on large number of factors including capability of the

employer to pay as well as the conduct on the part of the respondent employee. The discharge of burden of proof by the respondent that the employee was not in gainful employment. The learned counsel has particularly stressed reliance on the earlier judgment of the apex court in the case of Kendriya Vidyalaya Sangathan v. S.c.Sharma where the apex court has in great detail held that the payment of back wages cannot be granted unless there is sufficient evidence laid by the employee and burden is on the employee to establish that they took all necessary steps and action to find out whether alternate job is available or not during the period when the employee was not in service. The relevant portion of the judgment of the apex court in the case of U.P.State Brassware Corpn.Ltd. v. Uday Narain Pandey (Supra) reads as under:

> "56. A Division Bench of this Court in M.L.Binjolkar v.State of M.P. referring to a large number of decisions held: (SCC p.228, para 6)
>
> "6(7).. The earlier view was that whenever there is interference with the order of termination or retirement, full back wages were the natural corollary. It has ben

laid down in the cases noted above that it would depend upon several factors and the Court has to weigh the pros and cons of each case and to take a pragmatic view."

57. In Madurantakam Coop.Sugar Mills Ltd. v.S.Viswanathan the quantum of back wages was confined to 50%, stating: (SCC p.198, para 19

"19... It is an undisputed fact that the workman had since attained the age of superannuation and the question of reinstatement does not arise. Because of the award, the respondent workman will be entitled to his retiral benefits like gratuity, etc. and accepting the statement of the learned Senior Counsel for the appellant Mills that it is undergoing a financial crisis, on the facts of this case we think it appropriate that the full back wages granted by the Labour Court be reduced to 50% of the back wages."

58. In State of U.P. v. Ram Bachan Tripathi this Court denied the service benefits for the period the employee remained absent.

59. In Rajasthan SRTC v. Shyam Bihari Lal Gupta it was observed: (SCC p.407, para 3)

"3. According to the learned counsel for the appellant Corporation, the decree is absolutely silent so far as the back wages are concerned. The decree in essence contains only a declaratory relief without any consequential payment for monetary benefits. That being so, the executing court and the High Court were not justified in granting the relief sought for. Learned counsel for the respondent on the other hand submitted that when the decree clearly indicated that the termination was illegal non est, as a natural corollary, the plaintiff was entitled to the back wages."

> 62. In Kendriya Vidyalaya Sangathan this Court held: (SCC p.366, para 16)
>
> "When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed nay material in that regard."

16. The learned counsel for the petitioner has thereafter contended that it has been held by the apex court in the case of Regional Manager, SBI v. Rakesh Kumar Tewari reported in 2006 1 Supreme Court Cases 530 that there is no question of considering any evidence of the parties in absence of pleadings in the matter. The learned counsel has contended that the aforesaid principle of law has been applied even to the proceeding in Industrial Dispute Act by the Apex Court and it has been held that if there is no pleading there is no question of considering any evidence produced by the parties.

17. In the light of the aforesaid judgment, the learned counsel has submitted that in the present case there is no pleadings at all and the averments

set out hereinabove is vague and cannot be treated as necessary averments required to be made for the purpose of claim of back wages and / or pleadings to establish that the respondent employee tried to obtain alternate employment but failed to do so. The learned counsel has submitted that in the light of the aforesaid the Trial Court has erred in granting entire back wages with interest @ 6$% p.a. for the entire period of 14 years. It has been further submitted that except the oral statement of respondent employee that from 1982 to 1990 she was approaching the petitioner herein, there is no evidence produced of any approach to the Mill for the employment by the respondent and therefore also trial court has erred in granting back wages for the aforesaid period.

18. After considering the rival contention of the parties on the aforesaid submission I am of the view that the impugned order passed by the Trial Court cannot be sustained primarily because the trial court did not consider at all question of back wages in the impugned order. The trial court has not given any finding in the entire order that

the back wages is required to be given or not. There is no discussion at all in the impugned order on this aspect. The trial court has also not considered whether the respondent employee has lead any evidence to discharge the burden cast upon him to obtain the reliefs of back wages. The trial court has also without giving any reasoning or finding has passed the impugned order of entire back wages with interest thereon of 6%. I am of the view that in the light of the judgment of the apex court particularly in the case of U.P.State Brassware Corpn.Ltd. v. Uday Narain Pandey (supra) it is necessary that the trial court must consider various factors for the purpose of grant of back wages. In the present case there is no pleadings. Averments made in the complaint and reproduced herein are too vague to consider as pleadings for the consideration of payment of back wages. It is also equally correct that there is no evidence except the bare one sentence which is lacking in all necessary particulars in respect of claim of back wages either in respect of quantum or in respect of efforts to obtain alternate job by the respondent employee. In that light of the

matter and in the light of the view expressed by the apex court in the case of U.P.State Brassware Corpn.Ltd v. Uday Narain Pandey (supra) I am of the view that the order passed by the Trial Court cannot be sustained in so far as it related to grant of back wages and interest thereon @ 6% pa.

19. I am also of the view that the earlier view in various judgments of the apex court has been duly considered and explained by the apex court itself in its latest judgements of U.P. State Brassware Corpn.Ltd. (Supra) and it has been held that the back wages cannot be granted as a matter of course where reinstatement of an employee is ordered by the court. In view of the ratio of the judgment of the apex court in the case of U.P.State Brassware (Supra) it is not possible for me to accept the argument of the learned counsel for the respondent that he is not required to plead or prove any facts in so far as claim of back wages is concerned and once an order of reinstatement is granted relief of back wages must follow as a matter of course.

20. Now this leads me to the next question whether in the aforesaid circumstances I should remand back to the trial court for determination of the issue of back wages. I am of the view that to do so would not be an exercise in the interest of Justice. Firstly because an employee is out of employment from 1982 and we are already in 2006 that is almost 24 years have passed. Apart from the said fact this litigation itself was once earlier remanded by this court. Thus, I am of the view that the order impugned herein of back wages cannot be sustained in law and thus, the same should be struck down. Accordingly, I hereby set aside the said order of back wages granted by the trial court and impugned herein. How, this does not mean that the respondent would not be entitled to any amount of back wages whatsoever. This court can grant any appropriate amount of back wages in the interest of justice.

21. The learned counsel has submitted in other cases claim of various workmen including the right of employment has been settled @ 40% of back wages and that they would not be given reinstatement.

She has submitted that amount must be fixed by taking into consideration that the respondent in the present case has been reinstated in service. I am of the view that the respondent is not entitled to any back wages for a period prior to December 1995 because admittedly only on 22.12.95 an approach notice was issued by the respondent for the first time under BIR and is followed up by complaint in 1996. In the light of the aforesaid circumstances, I am of the view that respondent should be granted back wages of 30% from 1.1.96 till the date of reinstatement. Order of trial court is modified accordingly as under:

22. Petitioners to pay the respondent the back wages @ 30% of his last drawn wages from 1.1.96 till the date of his reinstatement. Petitioners will be at liberty to withdraw the excess amount of back wages deposited in this court than what is granted in the present order and the respondent will be entitled to withdraw back wages as per the present order from the court without any security or undertaking. Both the parties will be entitled to also withdraw accrued interest of their

respective entitlement as per the present order. Petition disposed of accordingly. On the application of both the parties, order is stayed for 6 weeks.